

Questions for the Record from Chairman John Thune
To
Mr. Steve DelBianco

Question 1. *Mr. DelBianco, I understand the argument that increasing the threshold for the ICANN Board to reject advice from the GAC from 50 percent to 60 percent is offset by the fact that any GAC advice to the ICANN Board must first achieve complete consensus among the 162 countries, meaning that the U.S., or any country for that matter, may object to any advice the GAC might offer. But what about a scenario where our government is asleep at the switch and fails to object, or actually agrees with some terrible advice from the GAC? What safeguard is in place against that type of scenario?*

Answer: Your question assumes a scenario where no government – not even the U.S. – would formally object to proposed GAC advice that would be adverse to interests of American businesses and citizens. Under such a scenario, there are additional safeguards in place to prevent implementation of adverse GAC advice.

First, a new restriction on GAC advice is a requirement that advice “is communicated in a clear and unambiguous written statement, including the rationale for such advice.” If the GAC advice lacked clarity or rationale, the ICANN board would not be required to consider that advice.

Second, the ICANN board can reject GAC advice with a vote of 60% of the directors. The board would take into account public comments from non-governmental stakeholders, and may reject GAC advice for any reason.

If the board rejects GAC advice, it must “try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution” in consultation with the GAC. This is an obligation only to “try,” and does not oblige ICANN to find a solution that is acceptable to the GAC. In these consultations, the board could propose modifications to the GAC advice that would mitigate the adverse element. But if GAC refused to adequately adjust its advice, the board’s decision to reject would still hold, and the GAC advice would be set aside.

Third, if the ICANN board accepted such GAC advice, ICANN could be stopped from implementing that advice by a challenge brought under the enhanced Independent Review Process (IRP). An aggrieved party or the Empowered Community can bring an IRP challenge based on actions of ICANN to “ensure that ICANN does not exceed the scope of its limited technical Mission and otherwise complies with its Articles of Incorporation and Bylaws.” While an aggrieved party must pay its own legal costs for the IRP, an Empowered Community IRP would mean that ICANN must pay all legal costs.

To bring an Empowered Community IRP requires support of 4 of the 5 stakeholder groups in the Empowered Community, which includes the GAC. However, the new bylaws ensure that governments could not block a community challenge of ICANN Board’s implementation of GAC advice. In what is known as the “GAC Carve-out”, the bylaws exclude the GAC from the Empowered Community decision about whether to challenge a board action based on GAC consensus advice, so the approval of just 3 stakeholder groups is required to challenge ICANN’s acceptance of GAC advice.

Several governments vigorously opposed these new bylaws provisions to limit GAC influence and lock-in their consensus method of decision-making. In a statement issued Mar-2016, France's minister for digital economy complained about ICANN's new bylaws:

"Despite the continued efforts of civil society and many governments to reach a balanced compromise, elements of this reform project will marginalize States in the decision-making processes of ICANN, especially compared to the role of the private sector."

Unnamed French foreign ministry officials also told Le Monde they were unhappy with the end result, saying: "This is an unsatisfactory condition. The consensus requirement only produces warm water. And that does not put the GAC on the same footing as the other committees of ICANN."

The French official is right – the GAC is not on the same footing as other ICANN stakeholders. That, however, is by design. Notwithstanding criticism from certain governments, the full package of transition accountability measures sufficiently cabins governmental influence and provides sufficient safeguards to block implementation of GAC consensus advice that is adverse to the non-governmental Internet stakeholder community.

Thank you for your question. I am at your service to elaborate on these responses and address other questions and concerns you might have.

Questions for the Record from Senator Marco Rubio
To
Mr. Steve DelBianco

Question 1. *The revised bylaws include provisions that ensure that ICANN maintains the ability to enter into and enforce contracts with registries and registrars, as well as include provisions that protect from ultra vires challenge Public Interest Commitments (PICs) agreed to by certain registries and registrars operating in the new gTLD marketplace. Such PICs are meant to mitigate DNS abuse in the new gTLD market, which is especially important as we see illegal behavior now taking place, including the prevalence of child abuse imagery cropping up for the first time in new gTLDs in 2015.*

To what extent is the ICANN community, including the Board, committed to ICANN's role in mitigating DNS abuse through contract enforcement?

Answer: ICANN community members who developed the new accountability proposal were committed to maintaining an Internet that is not subject to government restrictions on free expression. At the same time, we were committed to ensure that abuse safeguards in the new gTLD registry contracts would continue to be enforceable, and not subject to challenge under the more explicitly limited mission statement for ICANN. All 7 ICANN stakeholder groups approved the new proposal earlier this year, and both the ICANN board and NTIA accepted the recommendations. Here is how this commitment was articulated in the new bylaws:

ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers pursuant to these Bylaws ("Bylaws") or ICANN's Articles of Incorporation.

This protection from challenge is applied to "all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016," which includes agreements and renewals that contain the abuse "Safeguards" requested by the GAC.

Such safeguards could still become part of registry and registrar agreements negotiated in the future, as long as they avoid giving ICANN new powers to "regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a)." And the new bylaws expressly authorize ICANN to enter and enforce contracts: "ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission."

Moreover, all registry and registrar contracts require implementation and enforcement of any Consensus Policies that are developed by the ICANN stakeholder organization for generic TLDs (GNSO). These Consensus Policies are the mechanism by which the ICANN community addresses DNS abuse that was not already or adequately addressed in current contracts. For example, the GNSO developed policy regarding display of information about domain name registrants ("Thick Whois"). This policy will become binding and enforceable on all registries and registrars once implementation is complete.

Question 2. *Does the accountability proposal put forward sufficiently ensure that ICANN will enforce its contracts with registries and registrars in this regard?*

Answer: The accountability proposal did not alter ICANN's existing obligations to enforce its contracts and to enforce consensus policies against registries and registrars. As always, anyone can bring contract enforcement matters to the attention of ICANN's compliance department. However, ICANN moves deliberately to investigate and respond to enforcement complaints, not always to the satisfaction of those making the complaint. Concerns about enforcement have historically centered on ICANN's speed of follow-up and on differing interpretations of contract terms and policies.

There are two primary ways that ICANN can be made to enforce its contracts against registries and registrars.

First, affected parties can invoke the enhanced Independent Review Process (IRP) if ICANN was failing to enforce its contractual obligations and its inaction was in violation of ICANN's Commitments and Core Values. The IRP is a binding process and decisions of the independent reviewer can be enforced in California courts, or in any court that recognizes international arbitration proceedings.

Second, affected parties may work within the ICANN stakeholder organization for generic TLDs (GNSO) to amend and clarify any Consensus Policy where ICANN's compliance department is taking a too narrow or too broad interpretation of the policy.

The sufficiency of these measures will almost certainly be tested in the years ahead. If the ICANN community finds these measures insufficient, the next step is to propose changes that increase contract enforcement powers over registries and registrars. Such changes could be proposed as recommendations from formal reviews of accountability and transparency, or of the review of the new gTLD program. Under the new bylaws, registries and registrars alone would not be able to block a community challenge if ICANN refused to implement such bottom-up recommendations for stronger contract enforcement.

NetChoice appreciates the hard work accomplished in this regard so far and believes that ICANN and the multistakeholder community should continue to work collaboratively to mitigate DNS abuse within the confines of ICANN's mission.

Question 3. *Section 27.2 of the new ICANN bylaws lays out the process for developing and adopting Work Stream 2 issues, which include important matters like human rights, jurisdiction, and improvements to ICANN's transparency. The stated process involves CCWG development of the proposal followed by dialogue and exchanges with the Board. Subsection (v) concludes, "If, after the CCWG-Accountability modifies a Work Stream 2 Recommendation, the Board still believes it is not in the global public interest to implement the Work Stream 2 Recommendation, the Board may, by a vote of a two-thirds majority of the Board, send the matter back to the CCWG-Accountability for further consideration. The Board shall provide detailed rationale to accompany its action. If the Board determines not to accept a modified version of a Work Stream 2 Recommendation, unless required by its fiduciary obligations, the Board shall not establish an alternative solution on the issue addressed by the Work Stream 2 Recommendation until such time as CCWG-Accountability and the Board reach agreement."*

What is the global public interest?

Answer: For several years, NetChoice argued that for purposes of ICANN, the global public interest should be defined and limited to ICANN's scope – the Domain Name System (DNS) and Internet Protocol

address numbers. During the recent transition planning, we proposed our definition for global public interest: “the availability and integrity of registrations and resolutions”.

This definition would encompass global access to registering and resolving (using) domain names anywhere in the world, in any script or language, with the expectation that users of domain names could trust that the name was not being used for fraudulent or abusive purposes.

Unfortunately, we were unable to garner consensus for that definition. In fact, no single definition achieved consensus support, so ICANN will continue to define public interest in the context of its decisions and actions, as described in our next answer.

A definition of the public interest depends on the definition of ‘public.’ The ‘public’ is composed of multiple and diverse elements that frequently have very different interests, thereby making it very difficult to reach consensus on a single definition.

Question 4. How will the global public interest be determined?

Answer: Global public interest is defined by the multistakeholder community, in exercising its role in developing policies and holding the ICANN corporation and board accountable for its actions and inactions. This does not result in community agreement on a formal definition of “global public interest”. Rather, the new Commitments and Core Values in ICANN bylaws defer to the multistakeholder community to ascertain public interest in the context of each situation:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

While this approach does not give us a single, simple definition of global public interest, it does have the advantage of letting Internet stakeholders define the concept, instead of leaving that definition to ICANN’s management and board.

Question 5. Under the outlined process, could the Board indefinitely delay implementation of Work Stream 2 with the justification that the proposed Work Stream 2 proposals are not in the global public interest?

Answer: No, the board cannot “indefinitely” delay implementation of a Work Stream 2 recommendation for which the ICANN community has consensus support to force implementation of its recommendations.

The rationale for separating Work Stream 1 and 2 tasks was to identify what had to be implemented before the IANA contract expired, after which there would be less leverage to force accountability measures that would be resisted by ICANN’s board. That’s why Work Stream 1 includes new powers to block the board’s budget, overturn a board decision through an IRP challenge, and to recall the board of directors. The community deemed those powers sufficient to force a future ICANN board to accept Work Stream 2 changes that are developed and supported by community consensus.

First, the community can challenge the board with an Independent Review Process (IRP) for failing to follow its bylaws commitment to honor the bottom-up multistakeholder process. This challenge would

directly address the board's argument that proposed recommendations were not in the "global public interest". As noted above, ICANN's new bylaws defer to the community – not the board—to define the global public interest:

...ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest.

An IRP decision is a binding process taking approximately 6 months, and decisions of the independent reviewer can be enforced in California courts, or in any court that recognizes international arbitration proceedings. So IRP decisions could terminate any delay that was being caused by the ICANN board.

Second, the community can recall the ICANN board of directors, and designate new directors who would understand that Work Stream 2 recommendations should be accepted. If these new directors failed to accept the recommendations, they too could be recalled.

Taken together, these two measures ensure that ICANN board members cannot indefinitely delay implementation of recommendations that have the consensus support of the ICANN community.

Question 6. *Since such a delay would be consistent with the bylaws and would be within the scope and mission of ICANN, aside from spilling the Board, what would be the tools available to the ICANN community to overcome Board resistance and what are the steps for exercising those tools?*

Answer: The whole point of separating Work Stream 1 and 2 tasks was to identify what had to be implemented before the IANA contract expired, after which there would be less leverage to force accountability measures that would be resisted by ICANN's board. That's why Work Stream 1 includes new powers to block the board's budget, overturn a board decision through an IRP challenge, and to recall board directors. The community deemed those powers sufficient to force a future ICANN board to accept Work Stream 2 changes that are developed and supported by community consensus.

First, the community can challenge the board with an Independent Review Process (IRP) for failing to follow its bylaws commitment to honor the bottom-up multistakeholder process. This challenge would directly address the board's argument that proposed recommendations were not in the "global public interest". As noted above, ICANN's new bylaws defer to the community – not the board—to define the global public interest:

...ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest.

An IRP decision is a binding process taking approximately 6 months, and decisions of the independent reviewer can be enforced in California courts, or in any court that recognizes international arbitration proceedings.

Second, as you note, the community can recall the ICANN board of directors, and designate new directors who would understand that Work Stream 2 recommendations should be accepted. If these new directors failed to accept the recommendations, they too could be recalled.

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Question 7. *In your opinion, what would be the result of having a modest delay in the transition for the stakeholders and international community to make sure the accountability measures work properly?*

Answer: During the committee's hearing back in May-2016, I acknowledged that a modest delay of a few months might be useful in order to verify the creation of new organizational elements and the adoption of new ICANN Bylaws and Articles of Incorporation. At this point, these implementation steps are substantially complete. The required bylaws, articles, and entities have been put into place to implement the community's transition proposal.

Your question suggests that a modest delay would allow the community to make sure that accountability measures work properly. But there is no way to predict when the ICANN community would exercise its new powers to challenge a board decision or recall directors. These are extraordinary measures that are not expected to be exercised often.

Moreover, one reason for having these accountability measures available is that they will deter the ICANN board from defying consensus recommendations of the ICANN community. So, the board is likely to accede rather than force the Empowered Community to invoke its new powers.

So, a modest delay of several months would bring no reasonable expectation of seeing how well new accountability measures are working.

Some critics of the transition might therefore call for a longer delay, but that would re-kindle the fire at the United Nations, who sees the legacy US government role as something they should be doing instead. With this transition we are eliminating the role where one government (the US) holds ICANN accountable, and we are instead making ICANN accountable to the community of Internet stakeholders. This means the UN can no longer point to the US government role and say the UN should step into those shoes.

An indefinite delay of transition would signal that the US government does not actually trust the multi-stakeholder model that we are encouraging other governments to trust. The governments of China and Russia would likely exploit any delay to persuade moderate governments that the UN needs to replace the legacy US role – a result that none of us would find acceptable.

At this point, an indefinite deferral of this transition could create far more downside than upside for the interests of US government, businesses, and citizens.

Question 8. Do you see potential benefits to a modest delay?

Answer: During the committee's hearing back in May-2016, I acknowledged that a modest delay of a few months might be useful in order to verify the creation of new organizational elements and the adoption of new ICANN Bylaws and Articles of Incorporation. At this point, these implementation steps are substantially complete, so there is no longer any benefit there to defer the transition.

As explained in our response to your previous question, we believe the risks of indefinitely deferring this transition outweigh the minimal potential benefits of delay.